No. 72-637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

KENNECOTT COPPER CORPORATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF PURSUANT TO RULE 24(5)

ARTHUR H. DEAN
ROY H. STEYER
JOHN L. WARDEN
48 Wall Street,
New York, New York 10005.

WILLIAM SIMON
JOHN BODNER, JR.
FRANCIS A. O'BRIEN
1730 Pennsylvania Avenue, N.W.,
Washington, D.C. 20006.

Counsel for Petitioner

SULLIVAN & CROMWELL,
HOWREY, SIMON, BAKER
& MURCHISON,
Of Counsel.

February 14, 1974

INDEX

PAGE

The nation's current energy problems demonstrate the interrelationship of energy sources 2

The wave of new entry into the coal business, shown in the record to be under way, became a reality in 1973 3

Data for 1968-1973 show no trend toward concentration in the coal business 6

The total inaccuracy of the critical predictions made below emphasizes the importance of review by this Court 8

Divestiture would serve no competitive purpose and is not in the public interest 12

Conclusion 15

CITATIONS

Cases:

Cinderella Career & Finishing Schools, Inc. v. *FTC*, 425 F.2d 583 (D.C. Cir. 1970) 3

Procter & Gamble Co. v. *FTC*, 386 U.S. 568 (1967) 9

United States v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973) 10, 11

United States v. *General Dynamics Corp.*, No. 72-402 ..... 2, 3, 8

United States v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964) 10, 11

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 3

Commentary on this Case:

86 HARV. L. REV. 772 (1973) 9

Miscellaneous:

J. BAIN, INDUSTRIAL ORGANIZATION (1959) ... 9

Lapp, *Nuclear Salvation or Nuclear Folly?*, N.Y. Times Magazine, Feb. 10, 1974, at 12 14

Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965) 9

U.S. ENERGY OUTLOOK (1972) 13

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-637

KENNECOTT COPPER CORPORATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF PURSUANT TO RULE 24(5)

Since the filing of our reply brief over a year ago, there have been developments of major significance in the energy field which will have a marked impact on the future production and utilization of coal and all other energy sources.

Among other things, the past few months have provided the strongest possible evidence that the failure of the FTC and the Court of Appeals to take due account of interfuel competition in applying Section 7 to the Peabody acquisition was bad economics and bad law. The Commission's reversal in this respect of the carefully reasoned and factually detailed decision of the Administrative Judge was unexplained and, in light of current realities, is inexplicable.

Moreover, current developments confirm that, even aside from its erroneous perspective, the *ratio decidendi* adopted below was founded on false premises:

1. The wave of new entry into coal production that was underway at the time of trial assumed large proportions in 1973, refuting absolutely the Commission's determination that there were no likely entrants other than Kennecott—a determination made against all the record evidence and the careful findings of the Administrative Judge.

2. There has been no increase in concentration in the coal industry since 1967, likewise refuting absolutely the Commission's prediction of an "alarming trend" toward "tight oligopoly"—a prediction that was utilized by the Commission to treat an admittedly unconcentrated industry as if it were highly concentrated.

The Nation's Current Energy Problems Demonstrate the Interrelationship of Energy Sources.

The energy supply difficulties so much in the headlines in recent months have confirmed that "splintered thinking" about energy is not sustainable. The functional interrelationship and substitutability of the primary energy sources —oil, gas, coal and nuclear—has become manifest, and there has been general recognition that economic analysis and public policy with respect to energy must be based on such interrelationship and substitutability. In more concrete terms, analysts and government officials now look to coal as our most abundant and readily available domestic energy resource, and to nuclear energy, to meet an increasing portion of current and growing energy demand (see pages 13-14, *infra*).

We have noted in our earlier filings (Petition 14-19, Reply Brief 1-3) the failure below to take due account of interfuel competition (i) in determining the appropriate product market, and (ii) in analyzing the competitive effects of Kennecott's acquisition of Peabody however the market is defined. This question is also presented by *United States* v. *General Dynamics Corp.*, No. 72-402, submitted December 5, 1973. Should the Court affirm the broader perspective adopted by the district court in *General Dynamics*, whether in terms of market definition or in terms of weighing competitive effects, reversal of this case should follow on that ground alone.

If, however, the product competition issue is resolved differently in *General Dynamics*, the other important questions raised by the petition herein and, we submit, the product competition issue as well, will remain for consideration. Although both cases concern coal production, they are otherwise quite dissimilar: *General Dynamics* involves a traditional horizontal merger of two coal producers operating in a single state, while this "unusual merger case" (A14) represents the first application of the potential competition doctrine, as well as of Section 7 itself, to a true diversification acquisition.[1]

The Wave of New Entry into the Coal Business, Shown in the Record To Be Under Way, Became a Reality in 1973.

The Commission found (B54), and the Court of Appeals accepted (A20), that Kennecott, a copper company with no coal experience, was the one company likely to enter the coal business and that "there is no record evidence with respect to [other] potential entrants." The evidence of record—indeed, *all* the evidence, as found by the Administrative Judge before whom the case was tried—was directly to the contrary (C80-84, C226-27), but was brushed aside by the Commission with just the "haughty administrative aloofness" condemned in *Cinderella Career & Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583, 589 (D.C. Cir. 1970); see also *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 493-96 (1951).

---

[1] The Administrative Judge recognized the particular significance of interfuel competition in this potential competition case, finding (C230), "On this record, it appears that the actual and potential competition offered by other fuels, including nuclear energy, has a much more immediate and direct impact upon the decisions of buyers and sellers of coal and, therefore, upon the prices received by sellers of coal than does the presence of any single company as a potential competitor in the coal business."

Matters of public note that have occurred in recent months confirm beyond cavil that the Commission's inexplicable distortion of the record was wholly erroneous. Instances of actual new entry into the commercial coal business which bear special mention (but which are by no means exhaustive of the subject) are set forth below in conjunction with the record evidence relating to the company concerned.

RECORD EVIDENCE	1973 DEVELOPMENTS[2]
1. Standard Oil of New Jersey (now Exxon Corporation) had become through subsidiaries a large holder of coal reserves in the United States; had recently entered into a long-term coal supply contract with Commonwealth Edison in Illinois; and had secured water rights in connection with Wyoming reserves. (App. 1774, 1802-03, 2012-13, 2088-89, 2149, 2360, 3812)	1. The Exxon subsidiary that supplies Commonwealth Edison, Monterey Coal Company, reached production of 1,974,000 tons in 1972 at the Illinois mine. In 1973 Exxon began preparatory work for opening a new mine near Gillette, Wyoming.
2. Kerr-McGee Corporation, which dropped "Oil" from its corporate name to reflect the "total energy concept" as it expanded into uranium and coal, had acquired 100 million tons of coking coal reserves and over 1 billion tons of steam coal reserves; planned to open a coking coal mine; had a long-range concept for developing its steam coal reserves; and had had discussions about possible sales with Oklahoma Gas & Electric, Arkansas Power & Light and a utility in Shreveport, Louisiana. (App. 2891-93, 2901)	2. In 1973 Kerr-McGee announced long-term contracts with Arkansas Power & Light, Central Louisiana Electric Co. and Gulf States Utilities for deliveries of steam coal beginning in 1977 and 1978 and totaling 9.2 million tons per year.

[2] The 1973 Developments are taken from the 1973 *Keystone Coal Industry Manual* (No. 1); the *Washington Star News*, Aug. 24, 1973, A-1, A-14 (Nos. 1, 2, 3); the *Wall Street Journal*, June 19, 1973, at 8 (No. 2), Aug. 15, 1973, at 8 (No. 4); *Coal Age*, Dec. 1973, at 29 (No. 2); or an annual report of the company (Nos. 4, 5).

RECORD EVIDENCE	1973 DEVELOPMENTS
3. Atlantic Richfield Company had acquired extensive reserves in Southern Utah and expended over $2 million on exploration work there; had taken steps to develop coal elsewhere in the West; and had applied for water rights in Wyoming for coal development. (App. 1786, 3812)	3. During 1973 Atlantic Richfield announced long-term contracts with three separate utilities for deliveries of steam coal beginning in 1975 and 1976 and totaling 5.8 million tons a year.
4. Pacific Power & Light controlled coal reserves exceeding 1 billion tons in Wyoming and Montana. Don C. Frisbee, its President, testified at the trial in 1969 that the Company mined coal for its own power plant in Wyoming, was considering additional captive coal production to fuel new generating plants in Wyoming, had firm plans for joint production in Washington with Washington Water Power Company for a new power plant there, but had made "no definite plans" to sell coal from its reserves in Montana and Wyoming to third parties. (App. 2648, 2653-54, 2656, 2659, 2665)	4. In 1973 Pacific Power & Light announced a long-term contract for steam coal with Detroit Edison to be produced and delivered by its 50%-owned affiliate Decker Coal, with deliveries to begin in 1976 and reach 7 million tons a year in 1981 and to continue at that level until 2002. In early 1971 Decker had signed its first utility contract, which called for delivery of almost 4 million tons a year to Commonwealth Edison over a six-year period. Thus, contracts announced by Decker now exceed 11 million tons annually. This is in addition to 8.5 million tons per year that Pacific Power will produce for its own use by 1976 and to its substantial joint production with Washington Water Power. The Company's reserves are now estimated at 1.6 billion tons.
5. Montana Power had coal reserves. (App. 1042-43)	5. Montana Power's production of coal, which it began in 1968 through its wholly owned subsidiary Western Energy, reached 5.5 million tons in 1972 (all but 500,000 tons for sale to others), and three additional long-term contracts have been obtained (one with a joint venture of Montana Power and Puget Sound Power & Light and two with other utilities) under which deliveries will begin in 1975, at total levels of between 10.3 million and 13.1 million tons per year.

The activities of these five companies are but the crest of the wave. Other recent new entrants into the coal business include Ashland Oil, the Hunt Group, Oil Shale Corp., Westrans Industries, Falcon Seaboard, McCulloch Oil, Pullman, Zapata Norness, Gulf Resources, Mapco, United Nuclear, W.R. Grace, and Coastal States Gas. Still other companies, including Mobil, Shell, Texaco, Marathon, Union Pacific, Santa Fe and Peoples Gas (some of which have had substantial reserves for years), have recently acknowledged interest in production or otherwise shown that they are on the "edge" of the coal business.

In sum, events have more than borne out what the extensive and uncontradicted evidence at trial proved and the Administrative Judge found—that there were at the time of Kennecott's acquisition of Peabody "dozens" of firms having the capabilities and incentives for substantial new entry into coal production and likely to enter, including oil companies, gas companies, and certain utilities and railroads. Kennecott, a copper producer which had no prior stake or experience in any aspect of the energy market and owned only a single small and non-operating coal reserve, was clearly not of substantial import to the preservation of competition in the coal business.

Data for 1968-1973 Show No Trend Toward Concentration in the Coal Business.

A second fundamental premise of the Commission's decision was its prediction (B15-18, 25), accepted by the Court of Appeals (A10-13), that the admittedly unconcentrated coal business would move at an "alarming" rate to a state of high concentration. The trial record did not support such a prediction, and structural statistics now available for 1968-1972 (and preliminary data for 1973) show beyond argument that no such trend exists.

Market Shares of Top 4 and Top 8 Producers. In 1967, the last year for which data were available at the time of trial, the top 4 coal producers accounted for 29.2% and the top 8 for 39.7% of total production. The Commission—although its own economist testified that such a projection was not supportable (App. 748-49)—attempted to predict a "trend" toward "oligopoly" by contrasting these percentages with those for the year 1954, thirteen years earlier, which showed the top 4 at 15.8% and the top 8 at 23.6% of total production.

The data for 1968 through 1973, however, show that the aggregate market shares of the top 4 and top 8 producers have hardly varied at all in the last five years and continue at about 30% and 40%, respectively.[3]

PERCENTAGE OF TOTAL COAL PRODUCTION
TOP 4 AND TOP 8 PRODUCERS—1968-1973

	1968	1969	1970	1971	1972	1973
TOP 4	30.4	30.5	30.2	27.9	30.5	29.1
TOP 8	40.7	40.9	40.7	37.6	40.4	39.3

(The decrease in 1971 was due to an extended strike that affected the larger companies to a greater extent than some smaller, non-union producers.)

Total Number of Competitors. In 1967, there were 522 producers of 100,000 tons or more of coal.[4] Of these, 68 were "substantial" producers, *i.e.*, had annual production of

[3] These percentages are calculated from 1968-1972 data presented in the annual *Keystone Coal Buyers Manual*, a stipulated source of statistical data, and preliminary 1973 data presented in the January 1974 issue of *Keystone News Bulletin*, a sister publication. Even the data for 1973 reflect only to a minor extent the wave of new entry, which will begin to affect production statistics significantly in the years 1975-1978.

[4] Full information is not available on the number of firms producing under 100,000 tons a year, which probably number in the thousands (see RX 175, App. 3930-37, which covers only a few states accounting for a small percentage of national production).

1 million tons or more. In 1972 (there are as yet no preliminary data for 1973) the total number of firms was 517, about the same as in 1967, and the number of substantial producers, after decreasing to 61 in 1969, had moved back up to 76. Both the record data for 1967 and the now available data for 1972 show an *increase of over 35%* in the total number of producers since 1954, when there were 379 firms in the industry. The number of substantial producers was about the same in 1967 as in 1954 (68 versus 69), and, as already noted, had *increased by 10%* by 1972.[5]

The Commission's prediction of a highly concentrated coal business was based upon the assumption that because the aggregate market shares of the top 4 and top 8 producers had increased at some time in the past they would continue to increase, to oligopoly levels, in the future. No economist, businessman or other witness testified that such a projection was soundly based or, indeed, was at all probable. Six years of actual business experience have now borne out the cautionary testimony of the Commission's own economist that no such projection was supportable, and have further exposed the superficiality of the Commission's different analysis.

The Total Inaccuracy of the Critical Predictions Made Below Emphasizes the Importance of Review by this Court.

On the basis of the record facts alone, it has been suggested that the Court of Appeals, in sustaining the Commis-

[5] These data sharply differentiate the structural context of this case from that in *General Dynamics*, where the Government emphasized that in the Illinois portion of the producing area with which it is there concerned, 144 companies were producing coal in 1957 and only 39 in 1967. Brief for Appellant 6, *United States* v. *General Dynamics Corp.*, No. 72-402.

sion's decision, "abdicated its judicial responsibility to review critically FTC determinations." *Kennecott Copper Corp.* v. *FTC*, 86 HARV. L. REV. 772, 783 (1973). The recent industry developments noted herein wholly contradict the essential predictions upon which the Commission's decision was based, and, consequently, cast cumulative doubt upon their soundness when made.

Likewise unsound was the Commission's treatment of an alleged "trend" toward concentration as the decisional equivalent of existing high concentration, which the Commission (B16-17) and the Court of Appeals (A18) sought to justify by reference to the "incipiency" doctrine applied by this Court in horizontal merger cases.[6] A horizontal merger, however, directly causes increased concentration and thereby itself continues any past trend in that direction, while a conglomerate merger has no direct effect on concentration. Consequently, the "incipiency" doctrine developed in horizontal cases cannot be applied *ipso facto*, and without analysis in terms of the statutory standard, to potential competition cases. See Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1320-21, 1386 (1965).

This Court has not spoken at all on the application of Section 7 to diversification (or "pure conglomerate") mergers such as Kennecott-Peabody, *cf. Procter & Gamble*

---

[6] The coal industry is not only not "oligopolistic," but is far from that condition. Both in 1967 and in 1972, the market shares of leading producers and the total number of competitors were such as to place the coal industry in the category of "low concentration" in Professor Bain's analysis of industry structures; "low concentration" is the fifth of Bain's six categories, followed only by "atomistic," a characterization fitting no heavy industry in any nation. See J. BAIN, INDUSTRIAL ORGANIZATION 121-33 (1959).

Co. v. *FTC*, 386 U.S. 568, 577 & n. 2 (1967). The potential competition doctrine, on which the Commission sought to justify its decision in this case, had been articulated and applied by this Court in earlier cases involving market-extension and product-extension acquisitions. In such cases, both actual entry by the acquiring firm and its recognition as a potential competitor by those in the market are, on the basis of objective economic factors, inherently more likely than in a pure conglomerate case.

Moreover, even market-extension and product-extension acquisitions by potential competitors have been held likely to have a "substantial" effect on competition within the meaning of Section 7 only in highly concentrated markets with few potential entrants. These factors are essential to the Government's proof in a potential competition case because potential competition is of possible significance only if actual competition is not strong, and the potential competition of a particular firm may be of consequence only if there are not a number of other firms similarly situated.

That the Commission erroneously departed from precedent and misapplied the potential competition doctrine in this case may be seen from the Court's most recent application of the potential competition doctrine in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973), which involved a market-extension acquisition and was announced after the Court of Appeals' decision herein.

Both Mr. Justice White's opinion for the Court and Mr. Justice Marshall's concurring opinion in *Falstaff* adhered to the Court's basic recognition in *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 173-74 (1964), that potential competition assumes significance under the sub-

stantiality standard of Section 7 only in an oligopolistic market, *i.e.*, a market so concentrated in structure that non-competitive behavior is either a fact or, in Mr. Justice Marshall's words, "a serious risk." See 410 U.S. at 531-32, 558-61.

The Court's opinion shows that the New England beer market was so concentrated. In 1964, the 4 leading sellers of beer in the New England market accounted for 54%, and the 8 leading sellers for 81.2%, of total sales. In 1965, the top 4 sellers increased their combined market share to 61.3%. The number of brewers operating plants located within the market decreased from 32 in 1935, to 11 in 1957, to 6 in 1964, and the total number of brewers in the United States as a whole decreased from 663 in 1935 to 140 in 1965. 410 U.S. at 527-28. There was no indication of any new entry into the industry in recent years.

It was in light of these facts that the Court in *Falstaff* emphasized the importance of "an aggressive well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market" as a structural factor presently or prospectively restraining the abuse of market power. 410 U.S. at 532, quoting *Penn-Olin*, *supra* at 174.[7]

The structure and evolution of the coal business, as portrayed in the record and discussed above and in our

[7] It was also in this factual context that the Court left "for another day" the question of whether a market-extension merger might violate Section 7 solely because the acquiring company "could, but did not, enter *de novo* or through 'toe-hold' acquisition and . . . there is less competition than there would have been had entry been in such a manner." 410 U.S. at 537. Mr. Justice Marshall considered this question to have been settled, but his discussion as well was in the context of high market concentration. See 410 U.S. at 560-61.

earlier filings, are markedly different. They show, in contrast, a highly competitive industry with many significant new and potential entrants engaged in related lines of commerce.

Divestiture Would Serve No Competitive Purpose and Is Not in the Public Interest.

In light of the wave of new entry into coal production, and the absence of any trend toward concentration, the divestiture ordered by the Commission (without any hearing on relief) has no valid competitive purpose. In fact, the public interest in competition should be well served by Kennecott's continued ownership of Peabody. As the Administrative Judge noted, after stating that the "acquisition did not alter the structure of the coal industry in any way or raise any barrier to entry" and that the principal factors of significance in the leading conglomerate merger cases are "not even in issue" in this case (C224-25):

> ". . . when one considers the movement of oil and gas companies into the coal industry—companies that produce competing fuels—some comfort may be derived from the fact that Peabody was acquired by a company engaged in an essentially unrelated business, albeit both were engaged in mining. As a copper and coal enterprise, Kennecott-Peabody should provide some counter-balance to the developing 'energy companies' with their control of various competing energy resources."[8]

[8] At the time of trial, 4 of the 10 leading coal producers in the country had been acquired by oil companies (A29). The Administrative Judge noted that "there has been no governmental challenge to the acquisition of coal companies by oil companies despite the inter-fuel competition affected by such mergers," and said that while this "unchallenged amalgamation of coal companies into oil companies" did not constitute a basis for dismissing the complaint herein, it was "a factor that has some relevance in a proceeding concerned with the competitive health of the coal industry" (C225-26).

Moreover, concurrently with the recognition that public policy in the energy area must be premised on the functional relationship among the various sources of energy, there has been similar recognition that expansion of domestic coal production is a national priority. Administrator William E. Simon of the Federal Energy Office, in a paper distributed on February 11, 1974 at the 13-nation Washington Energy Conference, said that the programmed increase for meeting this country's 1980 energy needs "is based upon substantial growth in the production of coal," and projected a 60% increase in production by 1980 (see New York Times, Feb. 12, 1974, at 1, col. 6).

The capital requirements for substantial and sustained expansion of coal production over the next decade will run into billions of dollars, and dwarf the resources of Kennecott or any other company.[9] But Kennecott—which through the Peabody acquisition committed a new source of capital to coal—can continue to make an affirmative contribution toward increasing coal production through enlarging its investment in Peabody, if permitted to do so. Certainly, to thrust Kennecott completely out of the coal business would run counter to the public interest in encouraging expansion of domestic coal production.

The development in the 1950's and 1960's of larger firms in the coal industry, as we have previously noted (Petition 6-8; Reply Brief 4-5), was itself the result of compelling economic circumstances. A 1 million kilowatt generating

[9] In its December 1972 report to the Interior Department—prior to recognition of the necessity for greater expansion—the National Petroleum Council's Committee on U.S. Energy Outlook estimated capital expenditures of $14.3 billion would be required to achieve a modest 5% annual growth in coal production through 1985, plus additional billions for transportation facilities and construction of plants for the manufacture of synthetic fuels from coal. U.S. ENERGY OUTLOOK 137, 296 (1972). The growth rate now projected by Energy Administrator Simon is substantially greater than 5% annually.

unit burns over 400 tons of coal *each hour;* thus a plant composed of three such units would require a supply of about 10 million tons of coal annually over a useful life of 30 years (App. 2241, 2253). As electric utility plants grew to such sizes, coal producers necessarily had to grow in order to assemble and exploit the very sizable reserves required to make coal a competitive alternative to nuclear energy in the generation of electricity.[10] Now, with both coal and nuclear energy being called upon to play a far greater role in the nation's total energy supply as soon as possible,[11] coal producers must further increase their capabilities in order to meet even larger production requirements.

It is significant for Section 7 purposes that, despite the increases, past and future, in absolute size of coal producers, there has been and promises to continue to be a low degree of concentration and large number of substantial competitors and potential competitors in the coal business, and that the major purchasers of coal have had and will continue to have the competition and potential competition of other fuels, including nuclear energy.

Since the amendment of Section 7 in 1950, the Court has devoted substantial effort to ensuring that the lower courts, as well as the Commission, appropriately carry out Congress' mandate to halt mergers which might substantially

---

[10] Nuclear plants are built in a size of 1 million kilowatts or larger.

[11] The AEC is committed to reducing the time for bringing new nuclear capacity on stream from 10 to 6 years. AEC Release No. 47, for Week Ending Nov. 21, 1973, at 6. Nuclear generating plants will be coming on stream at the rate of one a month, and it is estimated that by 1980 uranium will generate 20% of the nation's electricity. In certain parts of the country, nuclear energy is already playing a very substantial role: Commonwealth Edison, which supplies electricity to the Chicago area, will obtain more than one-third of its output from nuclear plants this year, and will consume uranium fuel equivalent to 12 million tons of coal or 41 million barrels of residual oil. Lapp, *Nuclear Salvation or Nuclear Folly?*, N. Y. Times Magazine, Feb. 10, 1974, at 12, 13.

lessen competition. It is likewise important for the Court to ensure that Congress' mandate is not exceeded, both because it is not the function of the Commission and the courts to go beyond the expressed and intended bounds of legislation and because corporate acquisitions which do not transgress the prohibition of Section 7 are one important means of reallocating resources in a private enterprise economy and can be, as we submit the Peabody acquisition was, beneficial to the public interest.

As we have noted, the Court has not yet articulated standards for the application of Section 7 to pure conglomerate mergers, and this case, in addition to arising in an important economic context, is appropriate for the formulation of such standards to the end that Congress' mandate shall continue to be effectuated but not exceeded.

Conclusion

For the reasons stated in our previous filings and herein, a writ of certiorari should issue.

Respectfully submitted,

ARTHUR H. DEAN
ROY H. STEYER
JOHN L. WARDEN
48 Wall Street,
New York, New York 10005.

WILLIAM SIMON
JOHN BODNER, JR.
FRANCIS A. O'BRIEN
1730 Pennsylvania Avenue, N.W.,
Washington, D.C. 20006.

Counsel for Petitioner

SULLIVAN & CROMWELL,
HOWREY, SIMON, BAKER
& MURCHISON,
Of Counsel.

February 14, 1974